

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2014-346-WS

IN RE: Application of Daufuskie Island Utility)	ORS REPLY TO DIUC'S
Company, Incorporated for Approval of)	OPPOSITION TO ORS
an Increase for Water and Sewer Rates,)	MOTION TO STRIKE
Terms and Conditions)	AFFIDAVIT OF JOHN F.
)	GUASTELLA

The South Carolina Office of Regulatory Staff (“ORS”) respectfully submits this Reply to the Response filed by Daufuskie Island Utility Company, Inc. (“DIUC”) (“Response”) on June 17, 2021, to the ORS Motion to Strike the Affidavit of John. F. Guastella (“Motion”).¹ Upon reviewing DIUC’s Response, ORS agrees that aspects of Exhibit A and Exhibit B to DIUC’s Submission in Support of Reparations (“Brief”) may assist the Commission, should it rule for DIUC, in determining the proposed method of implementing reparations and the timing of billing surcharges.² Accordingly, ORS hereby amends its Motion and respectfully moves that the Commission issue an order striking only paragraphs 11 through 17 of Exhibit A to DIUC’s Brief. ORS respectfully asserts that should the Commission allow the entire affidavit to be entered into the record of evidence in this case, the Commission would contravene the terms of the Settlement Agreement to which the parties agreed, the Commission’s Order approving the Settlement Agreement, the Commission’s own Rules and Regulations, and the South Carolina Rules of Evidence.

¹ Commission Order No. 2021-83-H granted ORS an additional five (5) days to file this Reply such that it is due on June 28, 2021.

² ORS continues to oppose the implementation of DIUC’s request for retroactive reparations, as is stated in the ORS Brief filed on June 17, 2021.

ARGUMENT

1. THE SETTLEMENT AGREEMENT DID NOT CONTEMPLATE DIUC PRESENTING EVIDENCE UNFETTERED TO THE COMMISSION.

DIUC's assertion that ORS is attempting to re-write the Settlement Agreement is inaccurate. DIUC argues that the Parties are free to not only present legal arguments via their "written submission[s]" but also introduce novel facts³ for consideration by the Commission without restriction.⁴ Operating under this theory, DIUC states that ORS seeks to make the term "written submission" something more restrictive than it what it actually represents.⁵ On the contrary, ORS's position is necessary to stay in accord with the Settlement Agreement and the governing rules and procedures.

a. The Settlement Agreement Allows Only for a Limited Introduction of Additional Evidence to the Commission.

DIUC's position on the scope of new evidence permitted to be presented for consideration by this Commission under the Settlement Agreement is inconsistent with the parties' intent as demonstrated by the plain meaning of the language of the Settlement Agreement.⁶ DIUC's broad interpretation contravenes the Parties' stated intent, as indicated in Paragraph 8(d) of the Settlement Agreement. According to Paragraph 8(d),

Should the Commission issue an Order approving DIUC's proposed method of reparations and timing of billing surcharges, DIUC shall submit the calculation of the amount of the surcharges to individual customers for review by ORS. If there is a dispute as to the amount of the surcharges and their implementation, the Parties agree to proceed expeditiously to an evidentiary hearing to determine the appropriate amount of surcharges. (emphasis added).

³ DIUC Brief, Exhibit A, paragraphs 14, 16, 17, 18, 19, 20, 21, and Exhibit B, Remediation/Reparation Schedule.

⁴ "[T]here is no express limitation as to the form, the content, or attachment [to the Brief]." See DIUC Response, p. 4.

⁵ See DIUC Response, p. 3.

⁶ See DIUC Response, pp. 3-6.

The only evidence the Settlement Agreement contemplated being presented to the Commission before the occurrence of an evidentiary hearing is any that is necessary to make clear the proposed method of reparations and the timing of the billing surcharges, if approved by the Commission. The Settlement Agreement does not allow unrestricted introduction of new evidence to the Commission. In fact, Paragraph 8(d) specifically allows for a limited evidentiary hearing only in the event and after the Commission's issuance of an Order approving DIUC's method of reparations and timing of billing surcharges. Accordingly, it is improper and inconsistent with the Settlement Agreement to introduce for Commission consideration new evidence on issues outside of those contemplated by the plain meaning of the language of the Settlement Agreement viewed in its entirety.

The evidence presented for Commission consideration in Exhibit A of DIUC's Brief far exceeds that necessary to explain the proposed method of implementing reparations and the timing of billing surcharges. For instance, DIUC witness Guastella's Exhibit A to the Brief asserts that the Commission's Orders did not produce an accurate Return on Equity⁷ and opines on the legality of the Commission action.⁸ Nevertheless, in an effort to reasonably resolve the issue at hand, ORS is willing to modify its objection and request that only paragraphs 11 through 17 of Exhibit A to DIUC's Brief be struck.⁹ Accordingly, in the event the Commission grants DIUC's request for retroactive reparations, ORS respectfully modifies its Motion such that it no longer contests the inclusion of the remaining paragraphs in Exhibit A and Exhibit B for Commission consideration.

- b. The Parties Intended the Possibility of the Introduction of New Evidence Only On Limited Issues.

⁷ See DIUC Brief, Exhibit A, paragraph 11.

⁸ See Brief, Exhibit A, paragraphs 12, 13, 14, and 15.

⁹ While ORS vehemently disputes DIUC's characterization of ORS's intent on p. 5 of its Response, this reasonable amendment to ORS's Motion is intended to alleviate DIUC's concerns and assist the Commission.

DIUC asserts there is no ambiguity in the Settlement Agreement and, therefore, the Commission must allow DIUC the ability to introduce all of the novel facts included in Exhibit A.¹⁰ ORS agrees that the Settlement Agreement contains no ambiguity but asserts the Parties did not intend for new evidence to be introduced at this stage beyond that necessary to make clear the proposed method of reparations and the timing of the billing surcharges. DIUC asserts that characterizing this “written submission” as a “brief” is too narrow;¹¹ however, that is exactly the characterization assigned in Commission Order No. 2021-132. “The Settlement Agreement contains a procedure whereby after this Commission's decision regarding the proposed Settlement Agreement, the Parties can brief the matter [regarding the lawfulness of retroactive reparations] to the Commission for its further determination in this case.” Order No. 2021-132, p. 5 (emphasis added). Moreover, DIUC has characterized this written submission as a “brief” in multiple instances. The language used by the Commission in its Order No. 2021-132 is taken directly from the Consent Order filed by DIUC and can be found in the settlement testimony of DIUC witness Guastella and ORS witness Hipp.¹²

“In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.” D.A. Davis Const. Co., Inc. V. Palmetto Properties, Inc. 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). “Where two clauses in a contract are inconsistent, they must be so construed as to give effect to the intention of the parties as gathered from the whole instrument.” De Vore v. Piedmont Ins. Co. 144 S.C. 417, ___, 142 S.E. 593, 598

¹⁰ “[T]here is no express limitation to the form, the content, the attachments [to the Brief].” See DIUC Response, p. 4.

¹¹ See DIUC Response, p. 4.

¹² “The Settlement Agreement contains a procedure whereby after this Commission’s decision regarding the proposed Settlement Agreement, the parties can brief the matter to the Commission for its further determination in this case.” Consent Order, filed by DIUC on February 19, 2021; See also Settlement Testimony of John F. Guastella, p. 4, ll. 6-9 (“ORS and the Intervenors disagree, so the settlement contains a procedure whereby after the Commission’s decision regarding the proposed settlement agreement, the parties can brief the matter to the Commission for its further determination in this case.”); Settlement Testimony of ORS witness Dawn M. Hipp, p. 4, ll. 14-17.

(1928) (Cothran, J., dissenting). “The purpose of construction is to ascertain the intention as gathered from the whole instrument and to give effect, if possible, to every clause and word, if it can be done without violating any settled rule of law. Of two irreconcilable repugnant clauses, the first shall prevail, *though this rule is to be applied only when all reasonable modes of reconciling the apparent repugnancy have failed*, and subject to the rule that the intention gathered from the whole instrument shall prevail.” Id. (Cothran, J., dissenting) (quoting Smith v. Clinkscapes, 102 S.C. 227, ___, 85 S. E. 1064, 1066 (1915)). Additionally, “an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.” Stevens Aviation, Inc. v. DynCorp Intern. LLC, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (citing Crown Laundry and Dry Cleaners, Inc. v. U.S., 29 Fed.Cl. 506, 515, (1993)).

DIUC’s advocacy for Parties to have the ability to introduce new evidence beyond that necessary to clarify the proposed method of reparations and the timing of the billing surcharges for Commission consideration via written submissions renders the agreed upon limited evidentiary hearing to determine the appropriate amount of retroactive reparations superfluous. If the Commission were to allow the unlimited introduction and consideration of new evidence on other issues as presented by DIUC via its Brief,¹³ then there would be no need for an evidentiary hearing.

There is a simple way to reconcile the potential ambiguity that DIUC has raised: in the event the Commission rules that DIUC may charge its customers retroactive reparations, then DIUC may present applicable controverted factual issues¹⁴ for Commission consideration at the

¹³ Such action would be improper. In a contested proceeding, any information offered for inclusion into the record must be subject to objection and cross-examination and otherwise comply with the rules of evidence. See S.C. Code Ann. § 1-23-330 (stating that, regarding “[e]videntiary matters in contested cases,” “[a]ny party may conduct cross-examination.”). Commission regulations also require that assertions of fact be introduced in pre-filed testimony in accordance with S.C. Code Regs. Ann. § 103-845.

¹⁴ The Settlement Agreement only contemplates the possibility of an evidentiary hearing regarding a dispute as to the amount of the surcharges and their implementation.

contemplated limited evidentiary hearing. Indeed, this is exactly what the Parties intended when they agreed that if a dispute were to arise regarding the amount of surcharges and their implementation, then the Parties shall “proceed expeditiously to an evidentiary hearing to determine the appropriate amount of surcharges.”¹⁵

2. THE AFFIDAVIT AND SCHEDULE VIOLATE THE GOVERNING RULES OF EVIDENCE.

a. The Commission Rules and Regulations Are Clear and Unambiguous.

In citing the heading of S.C. Code Ann. Regs. 103-846, DIUC would have this Commission draw an arbitrary distinction between evidence properly put before the Commission in an evidentiary hearing and evidence presented to this Commission otherwise.¹⁶ However, “[a]lthough the title and headings are part of the statute, they may not be construed to limit the plain meaning of the text.” Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (citing Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)). “[T]he title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain.” Id. South Carolina Code Ann. Regs. 103-846 states, “[t]he rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed.” As ORS previously argued in the Motion, witness Guastella’s affidavit contravenes the South Carolina Rules of Evidence.¹⁷ There is no ambiguity in S.C. Code Ann. Regs. 103-846 in providing that the Commission shall follow the South Carolina Rules of Evidence.

¹⁵ Settlement Agreement, paragraph 8(d).

¹⁶ “...S.C. Regulation 103-846 intends to apply the Rules of Evidence to actual hearings, not briefing or other proceedings before the Commission.” DIUC Response, p. 7.

¹⁷ See ORS Motion, pp. 2-4.

DIUC's Response also cites S.C. Code Ann. Regs. 103-845 in support of its assertion that it may introduce all of the evidence in Exhibit A via its Brief.¹⁸ However, S.C. Code Ann. Regs. 103-845 specifically refers to the introduction of prepared statements and exhibits of a witness who is on the witness stand and being examined orally.¹⁹ It is this very process, which in part is detailed in S.C. Code Ann. Regs. 103-845, that the Regulations require to be followed for the introduction of new controverted evidence.

b. DIUC Witness Guastella's Testimony on Issues of Law is Inadmissible.

DIUC spends pages of its Response stating that its witness John F. Guestella is an expert and should be allowed to testify on legal matters.²⁰ It is through its Response that DIUC now seeks to prove its witness qualified to opine on legal matters with nothing more than their own *ipse dixit*.²¹ Regardless, however, "[e]xpert testimony on issues of law is inadmissible" in South Carolina. Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003).²² Moreover, aspects of witness Guastella's affidavit do not fall under the narrow exception to the rule, discussed in DIUC's Response,²³ because they were not intended to assist the Commission understand certain facts but rather to convince the Commission of legal conclusions.²⁴ For instance, paragraphs 12, 13, 14, and 15, which make bald legal conclusions regarding lawful and constitutionally sufficient rates, are not intended to assist the Commission's understanding of the facts at hand.²⁵

¹⁸ See DIUC Response, pp. 7-8.

¹⁹ "Witnesses shall be examined orally. Witnesses presenting testimony shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them." S.C. Code Ann. Regs. 103-845(a).

²⁰ See DIUC Response, pp. 9-11.

²¹ "Mr. Guastella is an expert...He knows and understands law and regulations." DIUC Response, p. 9.

²² ORS Motion, p. 2-3.

²³ See DIUC Response, p. 9-11.

²⁴ The Supreme Court of South Carolina has held that expert opinions on legal arguments are not designed to assist the trier of fact understand facts and fall outside the scope of South Carolina Rule of Evidence 702. See, e.g., Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (excluding expert testimony because it was not designed to assist the court's understanding of certain facts, but, rather, was legal argument as to why the court should rule, as a matter of law, on the legal question before it).

²⁵ See DIUC Brief in support of Retroactive Reparations, Exhibit A.

3. THAT ORS DID NOT OBJECT TO THE USE OF AFFIDAVITS UNDER DIFFERENT CIRCUMSTANCES AND FACTS IN THE PAST IS IRRELEVANT.

Finally, DIUC implies that because ORS has not objected to Commission reliance upon affidavits previously, ORS must now accept the affidavit of DIUC's witness Guastella as lawful evidence.²⁶ However, ORS did not file its Motion merely because DIUC filed an affidavit, but because in filing this affidavit DIUC seeks the Commission to consider evidence outside the agreed upon and legally acceptable parameters set forth in the Settlement Agreement. There are many variables that go into the consideration of whether to object to evidentiary issues, and whether ORS has objected to previously filed affidavits is irrelevant in this instance. It is irrational to conclude that the Rules of Evidence are waived for an entire case by a party if that party chooses not to object in an earlier instance involving different circumstances and facts.

Even more concerning than DIUC's attempt to circumvent the rules of evidence is its statement that parties may introduce evidence into the record without the opportunity for cross-examination.²⁷ In alleging support for this assertion, DIUC cites S.C. Code Ann. § 1-23-330(3), which states, "[a]ny party may conduct cross-examination." (emphasis added). It is clear that the verb "may" in this context refers to a party's option to conduct cross-examination, and not the adjudicative body's ability to prohibit cross-examination.

CONCLUSION

Had DIUC's Brief solely relied upon evidence properly before this Commission then ORS would have no reason to object. However, DIUC's Brief includes both legal argument and new evidence improperly before this Commission, as it is beyond the scope of what is permitted under

²⁶ ORS asserts that DIUC mischaracterizes the independent and unique natures and responsibilities of the Commission and ORS. The Commission is the quasi-judicial body that decides whether to allow an affidavit into the record. ORS is a party to the proceeding with the right to object. See DIUC Response, p. 11.

²⁷ See DIUC Response, p. 12.

the Settlement Agreement and the Commission's Order approving the settlement. Accordingly, with the aforementioned modification, ORS respectfully requests that paragraphs 11 through 17 in Exhibit A to DIUC's Brief be struck.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'A. Bateman', is written over a horizontal line.

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Columbia, South Carolina
June 28, 2021

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an Increase for Water and Sewer Rates,)
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_____)

CERTIFICATE OF SERVICE

This is to certify that I, Kristy L. Hatem, have this date served one (1) copy of **SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S REPLY TO DIUC'S OPPOSITION TO ORS MOTION TO STRIKE AFFIDAVIT OF JOHN F. GUASTELLA** in the above-referenced matter to the person(s) named below by causing said copy to be electronically mailed, addressed as shown below:

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Columbia, South Carolina
This 28th day of June 2021.